

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MOONEEN BOOTH)	
Claimant)	
VS.)	
)	
BEECH AIRCRAFT CORPORATION)	Docket No. 176,071
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On the 1st day of June, 1995, the application of the Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark dated December 17, 1994, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney Brian D. Pistotnik of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney Terry J. Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) What is the liability, if any, of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a nineteen (19) year employee with respondent was a crew chief in radio and electronic assembly. On February 2, 1993, while walking across the Beech parking lot she was slightly struck or bumped by the automobile of a co-employee. The impact did not knock her down, but she did stagger and was required to twist to maintain her balance. After the incident, claimant began experiencing back and leg pain which became sharper over a period of time. She described it as feeling like someone had stabbed her with a knife. The accident was reported to her foreman the next day. Claimant worked until February 8, 1993, when due to the severity of the pain, she stopped working.

Claimant was first referred to Dr. Michael Estivo, an orthopedic surgeon, on April 6, 1993. At that time, Dr. Estivo recommended a diskogram which proved positive at the L4-5 level. Claimant ultimately underwent a partial laminectomy and discectomy at L4-5 and L5-S1, with spinal instrumentation placed at L4-5 and S1 and a bilateral mass allograft fusion at L4-5 and L5-S1. Post operatively claimant was rated at fifteen percent (15%) whole body functional impairment.

Prior to being treated by Dr. Estivo, claimant was treated by Dr. Olsen beginning February 9, 1993, with a subsequent referral to Dr. Griesler, in Augusta, for epidural steroid injections. The referral to Dr. Estivo was by the workers compensation representative from Beech. Dr. Estivo initially opined claimant's problem was arthritis, but after ordering an MRI he diagnosed the protruding disc and neurological damage. Claimant's surgery was June 23, 1993.

Claimant underwent physical therapy subsequent to the surgery which helped to a limited degree, but currently some of her symptoms have not abated. Claimant was returned to work by Dr. Estivo on November 18, 1993, with restrictions against stooping

and squatting more than two and one-half (2 1/2) hours a day. Claimant was further limited to twenty (20) pounds frequent lift, thirty-five (35) pounds infrequent lift and was advised to rotate sitting and standing.

Claimant had suffered an earlier injury to her back in 1989 when she was struck by a large piece of plywood. At that time, she suffered pain in her back with radicular pain down her left leg which, after treatment by Dr. Olsen and Dr. Stein, abated. Claimant was again examined and treated by Dr. Olsen and Dr. Stein in 1991 when she began experiencing back pain without radiculopathy. Dr. Stein, at that time, after ordering an MRI, diagnosed arthritis in claimant's lumbar spine.

Claimant was examined by Dr. Daniel Zimmerman at the request of claimant's attorney. Dr. Zimmerman diagnosed lumbar problems which existed prior to claimant's February 4, 1993 injury and indicated claimant had suffered an aggravation of these preexisting conditions as a result of the February 4, 1993 incident. His final diagnosis was aggravation of lumbar disc disease with the aggravation being permanent. Dr. Zimmerman rated claimant at twenty-six percent (26%) of the body as a whole on a functional basis.

Subsequent to medical care claimant was returned to work with the respondent and continues working at her previous occupation at a comparable wage.

K.S.A. 1992 Supp. 44-510e(a) provides:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

As claimant has returned to work with the respondent at her regular work at a comparable wage, the Appeals Board finds the presumption of K.S.A. 44-510e is applicable in this instance and claimant is entitled to no work disability.

K.S.A. 1992 Supp. 44-510e(a) goes on to state:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Claimant was provided a fifteen percent (15%) functional impairment to the body as a whole by Dr. Estivo and a twenty-six percent (26%) functional impairment to the body as a whole by Dr. Zimmerman. The Appeals Board finds both doctors are well qualified to express an opinion regarding claimant's functional impairment and can find no compelling

reason for placing greater weight upon the opinion of one over the other. As such, the Appeals Board finds claimant has suffered a twenty and one-half percent (20.5%) whole body functional impairment as a result of the injuries suffered February 2, 1993, while working for respondent.

The Appeals Board is next asked to decide the liability of the Kansas Workers Compensation Fund.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479, (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765, (1976).

K.S.A. 1992 Supp. 44-567(b) states:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

Claimant suffered a preexisting injury in 1989 for which she was off work for a period of time and received medical care. Claimant was employed with respondent during this period of time and respondent had knowledge of this preexisting problem. Claimant was further examined in 1991 and diagnosed with arthritic symptomatology to the lumbar spine. It should be noted under K.S.A 44-566(b)(4) arthritis is specifically mentioned as a disease or a condition which would constitute a handicap to claimant's ability to obtain or retain employment.

K.S.A. 1992 Supp. 44-567(a)(1) states in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

The Workers Compensation Fund argues that Dr. Estivo, in assessing a "but for" against the Workers Compensation Fund, testified that claimant's problems were a combination of her preexisting low-back condition and her February 2, 1993 injury suffered

in the Beech parking lot. The Fund attorney appears to argue that the language "combination" is synonymous to the language found in K.S.A. 1992 Supp. 44-567(a)(2) which discusses "contribution" from a preexisting impairment. The Appeals Board finds that the words "combination" and "contribution" are not synonymous. It should also be noted that all Fund liability situations involve combinations of preexisting conditions with second injuries. Absent one of these elements, the Workers Compensation Fund would have no liability.

The Appeals Board finds that claimant's February 1993 incident with resulting injury would not have occurred but for claimant's preexisting back condition and one hundred percent (100%) of the liability in this matter is assessed against the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 27, 1994, shall be and is affirmed in all respects.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant and against the respondent, a qualified self-insured, for a 20.5% whole body functional impairment and further against the Kansas Workers Compensation Fund with the Fund reimbursing the respondent for 100% of any and all monies paid in this matter.

Claimant is entitled to 40.29 weeks temporary total disability compensation at the rate of \$299.00 per week totaling \$12,046.71, followed by 374.71 weeks permanent partial disability on a functional basis at \$90.54 per week totaling \$33,926.24 for a 20.5% permanent partial general body disability making a total Award of \$45,972.95.

As of June 7, 1995, there would be due and owing to claimant 40.29 weeks temporary total disability compensation at the rate of \$299.00 per week in the sum of \$12,046.71, plus 82 weeks permanent partial general body disability at the rate of \$90.54 per week in the sum of \$7,424.28 for a total of \$19,470.99 due and owing and ordered to be paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 292.71 weeks permanent partial general body disability on a functional basis at the rate of \$90.54 per week, totaling \$26,501.96, until fully paid or until further order of the Director.

Respondent is awarded the 100% reimbursement from the Kansas Workers Compensation Fund for any and all costs, expenses and monies expended as a result of this Award. All future liability is herein assessed against the Workers Compensation Fund for this Award.

All other findings of the Administrative Law Judge in his Award of December 27, 1994, which are not inconsistent with this Award are herein adopted by the Appeals Board and remain in full force and effect.

Fees necessary to defray the administration of the Workers Compensation Act are herein assessed against the Workers Compensation Fund to be paid as follows:

Barber & Associates	
Transcript of Regular Hearing	\$272.50
Deposition of Michael Estivo, D.O.	\$310.20
Gene Dolginoff Associates, Ltd.	
Deposition of Daniel D. Zimmerman, M.D.	\$245.50

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, Kansas
Terry J. Torline, Wichita, Kansas
Cortland Q. Clotfelter, Wichita, Kansas
John D. Clark, Administrative Law Judge
George Gomez, Director

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NUNC PRO TUNC

The Order of the Workers Compensation Appeals Board of June 19, 1995, in the above matter is modified as follows:

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 27, 1994, shall be and is affirmed in all respects.

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Dated this ____ day of June, 1995.

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